

MONTANA FIRST JUDICIAL DISTRICT, LEWIS & CLARK COUNTY

STATE OF MONTANA, ex rel.,)	
DEPARTMENT OF ENVIRONMENTAL)	
QUALITY,)	Cause No. BDV-2004-596
Plaintiff,)	
)	PARTIAL
-vs-)	CONSENT DECREE
)	
THE BNSF RAILWAY COMPANY,)	
EXXON MOBIL CORPORATION,)	
KALISPELL POLE AND TIMBER)	
COMPANY, KLINGLER LUMBER)	
COMPANY, INCORPORATED,)	
MONTANA MOKKO,)	
INCORPORATED, and DOES 1 to 100,)	
)	
Defendants.)	

I. BACKGROUND

1. The Montana Department of Environmental Quality (DEQ) filed a complaint in this matter on August 6, 2004, pursuant to Mont. Code Ann. § 75-10-701, et seq and other statutory and common law authorities. DEQ named as defendants The Burlington Northern and Santa Fe Railway Company (now known as BNSF Railway Company), Exxon Mobil Corporation (Exxon), Kalispell Pole and Timber Company, Klingler Lumber Company, Incorporated, the Montana Department of Natural Resources and Conservation, Montana Mokko, Incorporated, and Swank Enterprises.

2. DEQ filed an amended complaint in this matter on September 24, 2004, against the same Defendants.

3. In its amended complaint, DEQ seeks (1) abatement of an imminent and substantial endangerment to the public health, safety, and welfare and the environment; (2) recovery of remedial action costs incurred and to be incurred by DEQ in connection with the Kalispell Pole

and Timber (KPT), Reliance Refinery, and Yale Oil Refinery state Superfund facilities (the Facilities); (3) a declaratory judgment to establish the Defendants' liability for all future cleanup costs that DEQ will incur in connection with these facilities; and (4) penalties from some of the Defendants pursuant to the Montana Comprehensive Environmental Cleanup and Responsibility Act (CECRA) and other statutory and common law authorities.

4. The KPT facility is located near the City of Kalispell in Flathead County, within the NE¼ of the NW¼ of Section 8 and the SE¼ of the SW¼ of Section 5, all within Township 28 North, Range 21 West. The historic KPT property boundaries encompass approximately 35 acres.

5. The KPT property was used for pole de-barking, timber milling, and pole treatment from approximately 1947 to 1990. DEQ alleges that these operations have resulted in the release or threatened release of pentachlorophenol (PCP), dioxin, petroleum hydrocarbons, and other hazardous or deleterious substances into the environment.

6. The Reliance Refinery facility is located east of the KPT property. The historic Reliance Refinery property boundaries consist of approximately seven acres. The Reliance Refinery property was used as a refinery and cracking plant from the 1920s through about 1958. The property was leased to the KPT Company from 1969 to 1994. DEQ alleges that these operations have resulted in the release or threatened release of petroleum hydrocarbons and other hazardous or deleterious substances into the environment.

7. The Yale Oil facility is located south/southeast of the Reliance Refinery property. The historic Yale Oil property boundaries consist of approximately 2.3 acres. The Yale Oil property was used as a refinery beginning in the 1930s and was used as a bulk fuel storage facility from sometime in the 1940s until about 1978. DEQ alleges that these operations have

resulted in the release or threatened release of petroleum hydrocarbons and other hazardous or deleterious substances into the environment.

8. DEQ alleges that contamination from the KPT facility has co-mingled with contamination from the Reliance Refinery and Yale Oil facilities in the groundwater.

9. In response to the release or threatened release of hazardous or deleterious substances at or from the Facilities, DEQ undertook remedial actions and incurred remedial action costs, and will continue to undertake remedial actions and incur remedial action costs at the Facilities pursuant to CECRA.

10. Mont. Code Ann. § 75-10-701(4) of CECRA defines a “facility” to include “any site or area where a hazardous or deleterious substance has been deposited, stored, disposed of, placed, or otherwise come to be located.”

11. Mont. Code Ann. § 75-10-701(8) of CECRA defines “hazardous or deleterious substances” and based on that definition includes PCP, dioxin, and petroleum hydrocarbons.

12. Mont. Code Ann. § 75-10-715 of CECRA provides that “the following persons are jointly and severally liable for a release or threatened release of a hazardous or deleterious substance from a facility: (a) a person who owns or operates a facility where a hazardous or deleterious substance was disposed of; (b) a person who at the time of disposal of a hazardous or deleterious substance owned or operated a facility where the hazardous or deleterious substance was disposed of....”

13. DEQ has notified Exxon that it is potentially jointly and severally liable for remediation of the Yale Oil facility.

14. DEQ and Exxon desire to resolve Exxon’s alleged liability for past and future remedial action costs without the admission or adjudication of any issue of fact or law. The

Parties recognize, and the Court by entering this Consent Decree finds, that the Parties have negotiated this Consent Decree in good faith, that implementation of the Consent Decree will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair and reasonable and is in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

15. This Court has jurisdiction over the subject matter of this action pursuant to Mont. Code Ann. § 75-10-711 and other statutory and common law authorities. This Court also has personal jurisdiction over the Parties. Solely for the purposes of this Consent Decree and the underlying complaints, the Parties waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. The Parties shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and/or enforce this Consent Decree.

III. PARTIES BOUND

16. This Agreement shall be binding upon DEQ and Exxon and their successors and assigns. Any change in ownership or corporate or other legal status of either party, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the parties' responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. DEFINITIONS

17. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CECRA shall have the meaning assigned to them in CECRA. Whenever terms listed

below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

- a. "CECRA" shall mean the Comprehensive Environmental Cleanup and Responsibility Act, Mont. Code Ann. §§ 75-10-701, et seq.
- b. "Consent Decree" shall mean this Partial Consent Decree and any attached appendices. This Consent Decree is "partial" in that it does not apply to every defendant in this case.
- c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal or state holiday, the period shall run until the close of business of the next working day.
- d. "DEQ" shall mean the Montana Department of Environmental Quality and any successor departments or agencies of the State of Montana.
- e. "Exxon" shall mean the Exxon Mobil Corporation, and its predecessors, successors, subsidiaries, and parents.
- f. "Facilities" shall mean the sites designated by DEQ as the Kalispell Pole and Timber, Reliance Refinery, and Yale Oil Kalispell facilities that include any site or area where contamination from the facilities has come to be located. These facilities are depicted more particularly on Appendix "A."
- g. "Interest" shall mean interest at the rate specified for interest at Mont. Code Ann. § 31-1-106.
- h. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or an upper or lower case letter.
- i. "Parties" shall mean DEQ and Exxon.

j. "Remedial Action Costs" shall mean all costs, including but not limited to all direct and indirect costs, including investigation, removal, emergency action, remedial action, long term operation and maintenance costs, natural resource damages, attorneys' fees, and litigation costs, plus accrued Interest on all costs, that DEQ or the State of Montana on behalf of DEQ has paid or will pay at or in connection with the Facilities.

k. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

V. REIMBURSEMENT OF REMEDIAL ACTION COSTS

18. Exxon agrees to pay DEQ the amount of Two Hundred Ninety-Five Thousand Dollars (\$295,000), payable within twenty (20) days of the date both Parties sign this Consent Decree. This payment serves as Exxon's full and final reimbursement of Remedial Action Costs incurred or to be incurred. This payment may be made via check. The transmittal letter accompanying payment shall specify that the payment is to be applied to the Yale Oil Kalispell facility, org. unit 483770. Delivery shall be made to the following address:

Montana Department of Environmental Quality
Office of Financial Services
PO Box 200901
Helena, MT 59620-0901

19. At the time of any payment, Exxon shall send notice that such payment has been made to:

Cynthia D. Brooks
Legal Counsel
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

20. The payment for Remedial Action Costs incurred by DEQ shall be deposited by DEQ into the Environmental Quality Protection Fund and will be used by DEQ for past and future Remedial Action Costs incurred by DEQ at the Facilities.

VI. FAILURE TO COMPLY WITH AGREEMENT

21. In the event that any payment required by Paragraph 18 is not made when due, Interest shall continue to accrue on the unpaid balance through the date of payment.

22. If any amount due to DEQ under Paragraph 18 is not paid by the required date, Exxon shall pay to DEQ, as a stipulated penalty, in addition to Interest, \$1,000 per violation per Day that such payment is late. Furthermore, if any amounts due to DEQ by Exxon under Paragraph 18 are not paid within thirty (30) days of the required dates, DEQ may give Exxon written notice of such unpaid amounts together with an additional thirty (30) days for Exxon to make such payment. If Exxon fails to pay such amounts within the thirty-day cure period following written notice, DEQ shall no longer be bound by the covenant not to sue contained in Paragraph 27 and may withdraw the contribution protection provided to Exxon in this Consent Decree.

23. Stipulated penalties are due and payable within thirty (30) days of the date of demand for payment of the penalties. All payments to DEQ under this Paragraph shall be identified as "stipulated penalties" and shall be made in accordance with Paragraphs 18 and 19.

24. Penalties shall begin to accrue on the Day DEQ provides notice to Exxon of the violation and shall continue to accrue through the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

25. If DEQ brings an action to enforce this Decree, Exxon shall reimburse DEQ for all costs of such action, including but not limited to attorneys' fees.

26 Notwithstanding any other provision of this Section, DEQ may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Decree.

VII. COVENANT NOT TO SUE BY DEQ

27. In consideration of the actions that will be performed and the payment that will be made by Exxon under the terms of the Consent Decree, and except as specifically provided in Paragraphs 22 and 28 of this Consent Decree, pursuant to Mont. Code Ann. § 75-10-719, Exxon shall have contribution protection from third parties and DEQ covenants not to sue Exxon for Remedial Action Costs at the Facilities. DEQ's covenant not to sue is conditioned upon the satisfactory performance by Exxon of its obligations under this Consent Decree. DEQ's covenant not to sue extends only to Exxon and does not extend to any other person or entity.

VIII. RESERVATIONS OF RIGHTS BY DEQ

28. The covenant not to sue by DEQ set forth in Paragraph 27 does not pertain to any matters other than those expressly identified therein. DEQ reserves, and this Consent Decree is without prejudice to, all rights against Exxon with respect to all other matters, including but not limited to the following:

- a. claims based on a failure of Exxon to meet a requirement of this Consent Decree;
- b. liability arising from the past, present, or future disposal, release, or threat of release at any site or facility, other than the Facilities described herein;
- c. criminal liability;
- d. liability for actions of Exxon which violate state or federal law, other than CECRA, and which occur during or after implementation of the remedial actions; and

e. future liability for injunctive relief or administrative order enforcement under Title 75, Chapter 10, Part 7 of the Montana Code Annotated.

29. Nothing in this Consent Decree is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the State of Montana may have against any person, firm, corporation or other entity not a signatory to this Consent Decree

30. Within twenty (20) days after the Court signs this Order, DEQ shall dismiss with prejudice any claims relating to the Facilities asserted against Exxon, subject to the Court's retention of jurisdiction over this Consent Decree and the Parties provided in Section XVIII.

IX. COVENANT NOT TO SUE BY EXXON

31. Exxon covenants not to sue and agrees not to assert any claims or causes of action against DEQ or its contractors or employees with respect to the Facilities, the Remedial Action Costs or this Consent Decree, including but not limited to:

- a. any claim against DEQ related in any manner to the Facilities; and
- b. any claims arising out of remedial actions at the Facilities, including claims based on DEQ's selection of remedial actions, oversight of remedial actions, or acceptance of plans for such actions.

32. Exxon's covenant not to sue shall take effect upon execution of this Consent Decree by the Parties. Nothing in this Section, however, shall prevent Exxon from asserting any claims or defenses in response to subsequent claims brought by DEQ against Exxon in this case.

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

33. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. DEQ and Exxon each

reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Facilities against any person not a Party hereto.

34. DEQ and Exxon agree that the actions undertaken by Exxon in accordance with this Consent Decree do not constitute an admission of any liability by Exxon. Exxon does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Consent Decree, the validity of the facts or allegations contained in Section I of this Consent Decree.

35. The Parties agree, and by entering this Consent Decree this Court finds, that Exxon is entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by Mont. Code Ann. § 75-10-719, for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are Remedial Action Costs for the Facilities and remedial action costs incurred by other parties prior to and after the effective date of this Consent Decree.

36. Exxon assigns and subrogates to DEQ any rights of action or claims of contribution it may possess against the above-named Defendants or any other person in the above-captioned action. DEQ, in its sole discretion, shall determine when or how to pursue those assigned or subrogated rights.

37. If this Consent Decree is approved, in any subsequent administrative or judicial proceeding regarding other sites that is initiated by DEQ or by the State of Montana on behalf of DEQ for injunctive relief, recovery of remedial action costs, or other appropriate relief, Exxon shall not assert, and may not maintain, any defense or claim based upon the principles of waiver.

res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding regarding other sites were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by DEQ set forth in Paragraph 27.

XI. FACILITY ACCESS

38. Commencing upon the date the Parties execute this Consent Decree, Exxon agrees to provide DEQ and its representatives, contractors, and all representatives and contractors of any person conducting remedial actions approved by DEQ at the Facilities, access at all reasonable times to the real property owned or controlled by Exxon or its parent, sister or subsidiary entities or over which those entities retain a right to access. The purposes of such access may include, but not be limited to, sampling, excavation, or any other physical imposition on the property needed to implement the remedy. In addition, Exxon agrees to assert any rights of access it retained when it transferred the property as may be reasonably requested by DEQ.

39. Notwithstanding any provision of this Consent Decree, DEQ retains all of its access authorities and rights, including related enforcement authorities, under CECRA and any other applicable statutes or regulations.

XII. INSTITUTIONAL AND ENGINEERING CONTROLS

40. Exxon acknowledges that Institutional Controls may be necessary as part of selecting and implementing final or interim remedies for the Facilities. Upon issuance of the Record of Decision for Facilities, DEQ will specify those Institutional Controls, if any, which will apply to the property owned by Exxon. To the extent that Exxon retains any such ownership or control at the Facilities, Exxon agrees to use its best efforts to implement, maintain, and comply with each Institutional Control specified by DEQ for the Facilities in the future.

XIII. CONVEYANCE OF PROPERTY

41. The restrictions and obligations of Exxon with respect to the provision of access under Section XI and the implementation of, maintenance of, and compliance with Institutional Controls under Section XII are for the benefit of the Facilities and shall be considered covenants that run with the land and shall be binding upon Exxon and upon any and all persons who acquire any interest in all or any portion of the property.

XIV. RETENTION OF RECORDS/ACCESS TO INFORMATION

42. Until twenty (20) years after the effective date of this Consent Decree, Exxon shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, that relate in any manner to remedial actions taken at the Facilities or to the liability of any person for remedial actions conducted or to be conducted at the Facilities, regardless of any record retention policy to the contrary. Exxon agrees to provide DEQ reasonable access to such records that are in Exxon's possession or control. Exxon also agrees to affirmatively provide DEQ with any information Exxon possesses or controls which may facilitate DEQ's determination of final remedial alternatives. Exxon may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by state law. If Exxon asserts such a privilege, it shall provide DEQ with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted. However, no documents, reports, or other information created or generated pursuant to the requirements of this or any other judicial or administrative settlement with DEQ shall be withheld on the grounds that they

are privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to DEQ in redacted form to mask the privileged information only. Exxon shall retain all records and documents that it claims to be privileged until DEQ has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Exxon's favor.

43. After the conclusion of the document retention period in the preceding paragraph, Exxon shall notify DEQ in writing at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by DEQ, Exxon shall deliver any such records or documents to DEQ.

44. By signing this Consent Decree, Exxon certifies that, to the best of its knowledge and belief, it has:

a. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to DEQ, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation or control of the Facilities, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant or contaminant at or in connection with the Facilities;

b. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Facilities, after notification of potential liability or the filing of a suit against Exxon regarding the Facilities; and

c. fully complied with any and all DEQ requests for information regarding the Facilities.

45. As a condition to DEQ's agreement to enter into this Consent Decree, Exxon covenants and agrees that it will not communicate in any way or otherwise provide information

relating to the Facilities to any other party to this action without first providing DEQ's attorneys the opportunity to be present during such communications or to review any requested written information before transmitting it to any other party to this action. Exxon further agrees that it will not object to DEQ's selection of remedial actions, oversight of remedial actions, or acceptance of plans for such actions.

XV. NOTICES AND SUBMISSIONS

46. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Consent Decree with respect to DEQ and Exxon.

As to DEQ:

Cynthia D. Brooks
Legal Counsel
Montana DEQ
P.O. Box 200901
Helena, MT 59620-0901

As to Exxon:

Shane Coleman
Holland & Hart, LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639

and

Mark A. Zuschek
Exxon Mobil Corporation
3225 Gallows Road
Room 3D 2110
Fairfax, VA 22037

XVI. INTEGRATION/APPENDICES

47. This Consent Decree and its appendix constitute the final, complete and exclusive agreement and understanding between DEQ and Exxon with respect to the settlement embodied

in this Consent Decree. Exxon and DEQ acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. However, Exxon agrees to abide by DEQ's future Record of Decision issued for these Facilities. [The following appendix is attached to and incorporated into this Agreement: Appendix "A" is general map of the Facilities.]

XVII. EFFECTIVE DATE

48. The effective date of this Consent Decree shall be the date upon which the Court enters this Consent Decree, except as otherwise provided herein.

XVIII. RETENTION OF JURISDICTION

49. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Parties for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms.

XIX. MODIFICATION

50. Except as otherwise provided in this Section, no modifications shall be made to provisions of this Consent Decree without written notification to and written acceptance by DEQ and Exxon. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise, or modify this Consent Decree upon the motion of a Party.

XX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

51. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment. DEQ may modify or withdraw its consent to this Consent Decree prior to entry by the Court if comments received disclose facts or considerations


that indicate that this Consent Decree is inappropriate, improper, inadequate or not in the public's interest, in which case all payments made pursuant hereto shall be returned to Exxon within thirty (30) days.

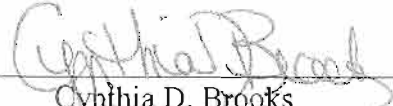
52. If for any reason the DEQ modifies or withdraws this Consent Decree or it is not entered by the Court in the form presented within one year of the date on which it is first lodged with the Court, this agreement is voidable at the sole discretion of any Party, in which case all payments made pursuant hereto shall be returned to Exxon within thirty (30) days, and the terms of the agreement may not be used as evidence in any litigation between the Parties or between the Parties and any third party except those parts of the Consent Decree that are specifically effective upon execution of the Consent Decree by the Parties.

53. The Parties acknowledge that they have carefully reviewed this document, know its contents and have signed it freely and voluntarily after reviewing it with counsel of their choice. For the purposes of interpreting this Agreement, no party will be deemed its author. The laws of the State of Montana shall govern its interpretation. Each undersigned individual represents that the terms herein have been explained to them by their respective attorneys and that they have the authority to execute this Consent Decree. This Consent Decree may be executed in counterparts, each of which will be an original, but all of which together will constitute a single agreement.


IT IS SO AGREED:


MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

DATED: 3/14/07 By: 
Richard H. Opper
Director

DATED: 3/14/07 By: 
Cynthia D. Brooks
Special Assistant Attorney General

EXXON MOBIL CORPORATION

DATED: 9 MAR 07 By: 
Len Racioppi

DATED: 3/13/2007 By: 
Shane Coleman

IT IS SO ORDERED:

DATED: _____
Jeffrey M. Sherlock
District Judge

